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ALEXANDER L. STEVAS,
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No. 80-1931

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1981

THOMAS COOK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR CERTIORARI-CRIMINAL CASE

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QUESTIONS PRESENTED

Did the district court err in holding that petitioner had no standing to suppress as evidence words illegally seized from his own mouth, from a motel room rented to a co-defendant?

Did the district court err in refusing to hold that the creation of a "tunnel" between adjoining motel rooms, made by the removal of the telephone plate, was an "enhanced" listening and, therefore, a seizure in violation of petitioner's Fourth Amendment rights?

Did the district court err in refusing to hold that, as the search warrants herein were based on the illegally seized conversations, all evidence obtained by reason of these search warrants must be suppressed?

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OPINIONS BELOW

The opinion of the Court of Appeals below (A-1) is reported in_____F 2d _____. The petition for rehearing en banc was denied, no opinion (A-7). The opinion of the District Court below (A-9) is reported in 493 FS 948.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals (A-) was entered on February 5, 1980. The Petition for Rehearing was denied (A-); the order entered March 31, 1981. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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STATEMENT OF THE CASE

Petitioner, with 3 co-defendants, were charged with certain drug-related offenses. Thomas Cook was indicted for conspiring to violate the Narcotics and Dangerous Drug Laws (Title 21, §841(a)(1), §846) and possessing with intent to distribute a controlled substance (Title 21, §841(a) and Title 18, §2)

The defendants were arrested in the parking lot of the Holiday Inn in Plattsburgh, New York on March 24, 1980; the van in which the marijuana was allegedly being transported was seized by the government agents, driven to the U.S.-Canadian border, searched by a drug-detecting dog, then, after a search warrant was obtained by the agents, marijuana was found.

Prior to the trial, a suppression hearing was held. At that hearing, Theodore Handoga, an agent of the Drug Enforcement Agency, testified that he was the supervising agent in this case and that he

made the decision to arrest the defendants when and where they were arrested.

He testified that, at the Holiday Inn in Burlington, Vermont, on March 20, 1980, he and his agent(s) were conducting a surveillance of Walter Burnett; that they were in an adjoining room, that he, during the afternoon removed a face plate from the electrical outlet on the wall in an attempt to listen to conversations in Burnett's room.

He testified that on March 21, 1980, he had followed Burnett to the Plattsburgh, New York Holiday Inn, again arranged for an adjoining room, that he removed the plastic face plate from the telephone jack where the telephone cord comes out of the wall, between his room and Burnett's, using a screwdriver; that in order to gain access to the jack he had to move two beds. He testified that the jack was 6" off the floor; a picture in evidence corroborated this. Agent Handoga testified that he could see light through the hole he had created.

Agent Handoga ordered the arrest of the defendants, in the parking lot of the Holiday Inn, in the afternoon of the 24th.

A second agent of the DEA, Clifford Radbourn, also testified at the suppression hearing. Agent Radbourn testified that he, too, had listened at the hole in the wall between the DEA agents' room and Burnett's room in the Plattsburgh Holiday Inn; that the switchplate had been removed by Handoga.

At the continuation of the suppression hearing, the defense called Norman R. Dotti, an acoustical engineer. After Mr. Dotti informed the Court of his education and professional experience, the Court accepted him as an expert in the field of acoustical engineering. Mr. Dotti testified in detail as to two occasions upon which he had studied the transmissions of sounds between the two rooms in the Plattsburgh Holiday Inn involved herein. Mr. Dotti testified that, with the telephone jack in place, he could hear no sounds coming from the room Burnett

had taken into the room of the DEA agents. He could, with a TV in the Burnett room turned to full volume, hear undistinguishable noise in the other room.

Mr. Dotti testified that a second series of tests was made, with the telephone jack removed. At optimum conditions, with his ear against the hole, he could distinguish less than 50 percent of the words being spoken in the Burnett room. Six inches from the hole, he could distinguish no words. Mr. Dotti testified that from an engineering point of view, the removal of the telephone plate "increased substantially the available amount of sound energy in [the agents' room] by creating that pathway, in doing so made it both audible and to some extent more intelligible."

The Court denied defendants' motions to suppress based on the overheard conversations.

Subsequently, Thomas Cook pleaded guilty to one of the two counts against him, reserving his right to appeal the denial of the suppression motions. He

was sentenced to two years' incarceration, and was released on bail pending determination of his appeal.

ARGUMENT

The panel of judges who heard this case held, that Thomas Cook was only a casual visitor in the motel room rented to co-defendant Walter Burnett and had no reasonable expectation of privacy therein; therefore, he had no standing to challenge the search which was allegedly based on conversations heard by DEA agents listening through a tjnnel between the motel room and an adjoining room. It is petitioner's contention that this holding is erroneous, that the situation here is distinguishable from that in Rakas v. Illinois, 439 US 129, in which an individual was held to not have standing to suppress evidence allegedly removed from the purse of a companion in the same room, in that Mr. Cook's own words were seized from his own mouth; his words are personal property.

By evaluating this Court's decision in U.S. v. Agapito, 620 F.2d 324 (1980), contrasting the facts

in that situation with those in the present situation, and distinguishing the law and facts, it becomes obvious that, using that decision as the most recent, most definitive holding on this subject, the seizure of words herein was in violation of Thomas Cook's Fourth Amendment rights. In Agapito, the government agents, in a motel room adjoining that of the defendants, were, from the time of their entry into the room, able to hear "sounds and parts of conversations." Their room and that of the defendnats had a connecting doore, with a crack between the door and frame; by pressing their naked ears to the crack, the agents were able to hear more (at 328). The Court based its decision in Agapito on the presumptions that 1) the voices could be heard in the adjoining room, unaided by any artificial, mechanical or electrical device (330), and 2) the agents had a right to be where they were, their ears were where ears had a right to be (331), citing U.S. v. Jackson, 588 F.2d 1046, 1054 (5th cir, 1978), cert. den.

422 U.S. 931 (1979). Further, the Court in Agapito held that the "location of the government surveillant vis-a-vis the individual surveilled is . . . a factor to be considered in assessing the justifiability of the individual's privacy expectations." (331) Finally, the Court held, at 332, that the occupant of motel room with an adjoining door cannot reasonably assume conversations will not be overheard.

The room in the Plattsburgh Holiday Inn in which Thomas Cook and the co-defendants allegedly held their conversations about "stuff" did not have a connecting door with the agents' room. The agents did not present any evidence that they were able to hear anything from defendants' room before they pressed their ears to the hole created by their removal of the telephone cover plate from the wall; the acoustical expert testified that nothing could be heard from the agent's room until the plate was removed, then only 50 percent of the sounds came

through clearly enough to be understood.

The expert testified that the removal of the plate from the wall of the agents' room augmented the sound level; this is certainly such an "artificial" device as to negate the first element in Agapito.

The agents testified that the switchplate which they removed was six inches from the floor, that in order to hear they had to lie on the floor, with their ears pressed to the hole. They also testified that in order to gain access to the hole, they had to move the bed. The agents' ears were not where they had a right to be; their positions vis-a-vis the defendants were not those an individual would expect in assessing his reasonable expectation of privacy.

It was on the basis of these conversations about "stuff" the agents allegedly overheard that the warrantless arrests of Thomas Cook and the co-defendants were made, and the warrantless search of the van occurred. As the overhearing of the

conversations was accomplished only by means of an artificial device, and the defendants' reasonable expectations of privacy were brutally violated, the seizures of their words, including those of Thomas Cook, were in violation of their Constitutional rights; all evidence must be suppressed.

Cook also contends that the recently-decided Taborda (U.S. v. Taborda, Docket #80-1251 Second Circuit 11/24/80) was not adhered to or properly applied in his case; that the Taborda holding that a telescopic intrusion into a room, an "enhanced viewing" did impair a legitimate expectation of privacy and "encounters the Fourth Amendment's warrant requirement" where an observation by unenhanced vision from a location where the observer may properly be did not, mandates that the use by agents of an artificially created tunnel be classified as an "enhanced listening" which requires Fourth Amendment safeguards.

Cook also contends that the Court also failed

to properly construe or apprehend the facts surrounding the warrantless search of the van by the drug-sniffing dog, and/or to apply the law thereto. Briefly, he contends there were no exigent circumstances requiring an immediate search (Carroll v. U.S., 267 US 132, Chambers v. Maroney, 399 US 42), nor was the search incident to the arrest.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eighty-one,

WILLIAM H. TIMBERS
JON O. NEWMAN,
CIRCUIT JUDGES, and
THOMAS C. PLATT,
DISTRICT JUDGE
sitting by designation.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

80-1352
1354
1356

THOMAS COOK, CARL KIPP BURNETT and WALTER BURNETT III,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Appeal from the United States District Court for the NORTHERN District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the NORTHERN District of New York, and was argued

by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the JUDGMENTS of said District Court be, and they hereby are, affirmed, substantially for the reasons set forth in Judge Mac Mahon's opinion dated July 9, 1980, 493 F.Supp. 948, so far as Fourth Amendment claims are involved, together with the following reasons of our own.

Appellants Walter Burnett III, Carl Kipp Burnett and Thomas Cook were indicted on charges of conspiracy to distribute a controlled substance, marijuana, in violation of 21 U.S.C. § 841(a)(1) (1976). The Burnett brothers also were charged with knowingly and intentionally distributing 40 pounds of marijuana, in violation of 21 U.S.C. § 841(a) (1976) and 18 U.S.C. § 2 (1976). Cook also was charged with possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 811(a) (1976) and 18 U.S.C. § 2 (1976).

Walter Burnett and Cook pled guilty to the substantive charges against them, reserving the right to appeal from the denial of their motions to suppress evidence. Carl Burnett was tried before a jury and was convicted on both counts with which he was charged.

All three appellants claim on appeal that the district court erred in refusing to suppress (a) statements which were overheard by Drug Enforcement Administration (DEA) agents in a motel in Plattsburgh, New York, and (b) 40 pounds of marijuana which were found in a van leased by Cook and in Walter Burnett's possession.

The statements, made by Walter Burnett, Cook, and a fourth defendant who was acquitted by the jury, were overheard by DEA agents who had rented a motel

room next to the one occupied by Walter Burnett. The agents were able to overhear normal conversations in Burnett's room by removing a plastic face plate covering the telephone connection in the wall of their room (which corresponded with a similar connector in Burnett's room), and by listening at the place where the face plate had been removed. No artificial, mechanical or electronic devices were used to augment the sound travelling from Burnett's room into the agents' room.

Appellants assert that the agents' actions violated their rights under the Fourth Amendment and that any statements overheard by the agents should have been suppressed. We agree with Judge MacMahon's conclusion that there was no Fourth Amendment violation and that the statements were admissible. 493 F.Supp. 948.

Judge MacMahon correctly held that only Walter Burnett had even an arguable "reasonable expectation of privacy" in the motel room which would enable him to challenge the search. Cook was only a "casual visitor", who entered the motel room just minutes before the conversation in question took place, and had no reasonable expectation of privacy in the room. Rakas v. Illinois, 439 U.S. 128, 142 (1978); United States v. Agapito, 620 F.2d 324, 335 (2 Cir. 1980). "[A]n illegal search only violates the rights of those who have 'a legitimate expectation of privacy' in the invaded place." United States v. Salvucci, 100 S.Ct. 2547, 2553 (1980). Thomas Burnett, who was never present in the motel room, had no "reasonable expectation of privacy" in a room he never saw. No right of his conceivably could have been violated when the government listened to a conversation in which he did not participate.

Walter Burnett, who rented the motel room and

occupied it for several days, stands on a different footing. We agree with Judge MacMahon, however, that any expectation of privacy which Burnett may have had was not "reasonable" under our prior holding in United States v. Agapito, supra. The agents were able to overhear Burnett's conversation in their room with their naked ears, "unaided by an artificial, mechanical or electronic device," Id., 620 F.2d at 330; c.f., United States v. Taborda, Slip Op. 6469 (2 Cir. Nov. 24, 1980). There is no question that the agents had a right to be where they were. They merely made a minor physical alteration in their own room in order to enhance their ability to hear. Agapito makes clear our reluctance to interfere in the activities of law enforcement officers who use no more than physical means to enhance their ability to hear what is being said in an adjoining room. Absent the use of electronic or other artificial devices, we adhere to our position in Agapito. Finally, we note that the occupant of a motel room reasonably will have a lesser expectation of privacy than a person in a residence; he assumes a greater risk that his neighbors will have an interest in what is being said in his room. United States v. Agapito, supra, 620 F.2d at 331.

We hold that Judge MacMahon was correct in refusing to suppress the statements overheard by the DEA agents.

We also hold that the inspection of the van at the United States Customs Office by "Champion", a drug sensitive dog, was not improper. Even assuming that Champion's sniffing constituted a search for Fourth Amendment purposes, but see United States v. Bronstein, 521 F.2d 459 (2 Cir. 1975), cert. denied, 424 U.S. 918 (1976), the warrantless search was constitutionally valid, as in the case of a search of an automobile subsequent to an arrest. Texas v.

White, 423 U.S. 67 (1975); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973); United States v. Mannino, slip op. 333, 342 (2 Cir. Nov. 18, 1980).

We reject the claim by Walter Burnett and Cook that their arrests were not supported by probable cause. The motel room conversations overheard by the DEA agents were more than ample to give the agents a "reasonable objective basis for belief in [Burnett's and Cook's] guilt." United States v. Webb, 623 F.2d 758, 761 (2 Cir. 1980). Among other things, the agents heard appellants discuss the possibility that they might be arrested for conspiracy if the van was inspected, heard one appellant disclose where in the van the "stuff" was hidden, and heard appellants discuss the fact that western Canada was "dry" and that they stood to make a lot of money. The agents had ample basis for their suspicion that, when Walter Burnett went to take his belongings out of the van, a transfer was about to take place.

Moreover, we are not persuaded that the evidence was insufficient to support Carl Burnett's conviction for distributing marijuana. He was liable as an aider and abettor of an illegal transfer from Walter Burnett to Cook pursuant to 18 U.S.C. §2. The statute prohibiting the distribution of a controlled substance prohibits the "actual, constructive or attempted transfer of a controlled substance." 21 U.S.C. § § 802(8), 841(a). Based on the evidence, especially testimony by Cook that at the time he was arrested he was about to get into the van and drive to Canada, a rational jury could have concluded that Burnett and Cook at least were attempting a transfer when they were interrupted by the DEA agents. We find unpersuasive Carl Burnett's argument that the transfer of marijuana between co-conspirators in a scheme commercially to distribute the drug is not a transfer prohibited by 21 U.S.C. § 841(a). His

reliance on United States v. Swiderski, 548 F.2d 445 (2 Cir. 1977), is misplaced. That case expressly distinguishes the circumstance there from prosecution of "one who acts as a link in the chain of commercial distribution." Id. at 451.

Finally, we reject Cook's claim that his sentence of two years imprisonment constitutes cruel and unusual punishment and should be reduce by this Court. Aside from his failure to move in the district court for reduction of sentence, Fed. R. Crim. P. 35, his sentence being well within the statutory limit prescribed for the crime to which he pled guilty, does not violate the Eighth Amendment. United States v. Dawson, 400 F.2d 194, 200 (2 Cir. 1968).

We order that the mandate issue forthwith.

/S/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS
United States Circuit Judge

/S/ JON O. NEWMAN
JON O. NEWMAN
United States Circuit Judge

/S/ THOMAS C. PLATT
THOMAS C. PLATT
United States District Judge
Sitting by Designation

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day March, of one thousand nine hundred and eighty-one.

----------x

UNITED STATES OF AMERICA

Plaintiff-Appellee

No. 80-1352
80-1354
80-1356

-against-

THOMAS COOK, CARL KIPP BURNETT and WALTER BURNETT III,

Defendants-Appellants.

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Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Thomas Cook, Carl Kipp Burnett and Walter Burnett III,

Upon consideration by the panel that heard the

appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/S/ A. DANIEL FUSARO
A. DANIEL FUSARO,
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	Criminal No. 80-CR-32
- v -	:	
WALTER BURNETT III, CARL KIPP BURNETT, THOMAS COOK and HERMANN WALLNER,	:	OPINION
Defendants.	:	

*

MacMAHON, D.J.

Defendants Walter Burnett III and Thomas Cook moved before the Honorable Neal P. McCurn to suppress statements overheard by government agents in two motel rooms in Burlington, Vermont and Plattsburgh, New York, as well as marijuana later seized from a van leased by Cook.[1] Judge McCurn referred the suppression motion to us.

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* Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

We held a hearing on May 29 and June 16-18, 1980 and denied the motion prior to trial.[2] This opinion constitutes our findings of fact and conclusions of law with respect to the suppression motion.

The facts relevant to this motion, as set out in the papers and developed at the hearing, appear as follows:

On March 19, 1980, Carl Kipp Burnett, who is Walter Burnett's brother and also a co-defendant in this case, was observed crossing the border between Canada and the United States into Vermont in a dark brown or black Dodge van with Ontario license plates. Customs officials stopped and searched the vehicle and found two secret compartments which they were unable to inspect because they lacked a specially designed tool necessary to open them. No contraband was found elsewhere in the van, but, nevertheless, United States Customs alerted agents of the Federal Drug Enforcement Administration who placed the van under surveillance after it had crossed the border

into Vermont.

On March 20, Carl Kipp Burnett drove the van to the Holiday Inn in Burlington. After parking the van, he went to a room rented to his brother Walter. DEA agents rented an adjoining room and removed a plastic face plate from an electrical outlet in the wall of their own room in an attempt to overhear the suspects' conversations. Although the agents could overhear Walter's telephone conversations and other sounds coming from the neighboring room, nothing of a criminal nature came to light. Later that day, Walter and Carl Kipp Burnett drove to the Burlington airport where Carl Kipp boarded a commercial flight; Walter returned to his room at the Holiday Inn.

On March 21, Walter Burnett drove the van to Plattsburgh, New York, where he checked into Room 458 of the Holiday Inn. This time, the agents rented both Room 460, which had a common wall with Room 458, as well as a room across the hall from which they could observe the Dodge van in the motel parking lot.

The wall separating Room 458 from Room 460 was constructed of masonry approximately eight inches thick. There was no door connecting the rooms. Behind the headboard of the bed in the agents' room, some six to twelve inches above the floor, was a plastic face plate through which telephone wires led into the wall. Apparently there was a similar telephone face plate directly opposite leading to Burnett's room. The agents moved the bed out of the way and used a screwdriver to remove the plate from their own side of the wall. For the next several days, they attempted to overhear Burnett's conversations by taking turns lying on the floor and placing an ear near the opening in the wall where the plate had been removed. At no time did the agents use any electronic device to record sounds coming through the wall, nor did they commit a technical trespass into Burnett's room or place anything inside the wall itself.

An acoustical engineer, qualified as an expert witness, testified at the suppression hearing that with the telephone face plate in place no ordinary conversation in Room 458 could possibly be overheard and understood in Room 460. He also testified that when the plate was removed, speech of a normal conversational volume from various places in Room 458 would be only partially intelligible to a listener in Room 460 with his ear close to the opening.

The substance of what the DEA agents overheard from Burnett's room is important since it bears on the existence of probable cause to arrest the defendants and later search the van. The key conversation occurred when Thomas Cook and Hermann Wallner entered Walter Burnett's room on March 24. Special Agent Rabourn testified that a conversation among all three ensued concerning the border stop of Carl Kipp Burnett on March 19; in particular, one of them said they could have been convicted of conspiracy if the residue in the traps had been

discovered. There was also talk of western Canada being "dry" and that they could make quite a bit of money. Before leaving the room, Cook asked Walter Burnett which one of the traps the "stuff" was in, and Burnett replied that it was in the trap underneath the stove. All three individuals then went out to the parking lot where Cook and Walter Burnett opened the Dodge van and removed some of Walter's clothing. At that point they were all arrested.

After the defendants were in custody, Agent Rabourn drove the van to a United States Customs post in Rouses Point, New York, but no search of the vehicle was made at that time. Later the same day, while still under the control of government agents at Rouses Point, the van was inspected by Champion, a dog specially trained to detect controlled drugs. Under the supervision of a Customs dog handler, Champion first toured the outside of the vehicle where he reacted positively to two tanks beneath the carriage. The van was then opened and Champion taken

inside where the dog reacted positively to the stove and a gold metal suitcase. No warrant was obtained in connection with this dog search.

Relying largely on the overheard conversation and the results of the dog search, the government then obtained a warrant to search the van, which led to the discovery of forty pounds of marijuana hidden in a secret compartment under the stove. Cook and Walter Burnett now invoke the Fourth Amendment's prohibition against unreasonable searches and seizures in asking the court to suppress both the statements made in Burnett's hotel rooms and the marijuana later seized in the van.

In Rakas v. Illinois, 439 U.S. 128 (1978), the Supreme Court reaffirmed the principle that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[3] Thus, the Court held that the question in Fourth Amendment cases which had previously come under the rubric of standing since Jones v. United

States, 362 U.S. 257 (1960), should instead be determined by addressing the substantive issue of whether the proponent of a suppression motion had his own Fourth Amendment rights infringed by a challenged search or seizure. This in turn depends on whether the movant himself had a reasonable expectation of privacy in the area searched.

We find that Cook lacked any reasonable expectation of privacy in a hotel room which was neither registered in his name nor occupied by him. Although "legitimately on the premises" by virtue of having been invited in by Burnett, Cook had never been in the room before his brief visit on March 24, and on that occasion he was in the room for only a few moments before agents overheard the incriminating statements. Considering that a hotel room gives even its registered occupant only a very limited reasonable expectation of privacy,[4] we do not believe that a casual visitor, such as Cook, is afforded any protection by the Fourth Amendment under these circum-

stances. Accordingly, we deny his motion to suppress the conversation overheard in the Plattsburgh Holiday Inn.

Walter Burnett, on the other hand, could reasonably expect that his privacy interest would receive at least some limited protection since he was the registered occupant of the hotel room and had actually stayed there several days. United States v. Agapito, No. 79-1257, slip op. at 1681 (2d Cir. Mar. 12, 1980). Unquestionably, he did in fact believe that his conversations behind the closed door of his room would remain private; the question we must decide, however, is whether that expectation is reasonable under the circumstances of this case.

In United States v. Agapito, supra, our Court of Appeals held that government agents did not violate the Fourth Amendment by pressing their ears against a door connecting their hotel room with that of the defendants in an attempt to overhear their conversations. The court stressed three factors in making

its decision: First, agents used only their naked ears, unaided by any artificial, mechanical or electronic device. Second, the agents had a legal right to be in the adjoining room. "We decline to restrict their movements in their own room in order to prevent the overhearing of conversations in an adjoining room."[5] The final factor was the reduced privacy afforded by a hotel room when compared with a private residence. "A person in a hotel room therefore takes a greater risk than one in a residence that, instead of neighbors, an adjoining room may contain strangers or, as in this case, even persons with interests adverse to his own."[6]

The only significant factual difference between Agapito and this case is that here the agents removed a plastic face plate from their side of the wall to enable them to overhear the defendants' conversations. By thus manipulating the environment, Burnett contends the agents went beyond the range of activities permitted by Agapito.

Although the question is not free from doubt, we believe the actions by DEA agents violated no Fourth Amendment rights of Walter Burnett. In so deciding, we find particularly important the reluctance of our Court of Appeals to restrict the movements of government agents in an area where they are legally entitled to be. As long as the agents remained wholly within their own room, we believe the fact they altered that room by removing a face plate accessible only from their side of the wall is the same type of "hair-splitting distinction" which the Agapito court declined to make. In addition, since the occupant of a hotel room takes a significant risk that those in the adjoining room may be adverse to his own interests, it seems fair to expect that a would-be listener might make whatever physical alteration in his own room was necessary to enable him to overhear a conversation next door with his naked ear. Not being familiar with the physical characteristics of the adjoining room,

Walter Burnett took the risk that a fortuitously positioned face plate might allow a government agent just such an opportunity.

Accordingly, we hold that DEA agents did not violate the Fourth Amendment rights of defendant Walter Burnett by their activities in either the Burlington or Plattsburgh Holiday Inn, and we therefore deny his motion to suppress all conversations overheard in those places. It follows that defendants' March 24 conversation was properly relied upon to support the issuance of the search warrant which led to the discovery of marijuana in the van. We also find that this conversation provided ample probable cause to believe that a cache of marijuana was hidden in the Dodge van and that defendants were engaged in criminal activity at the time of their arrest.

The next question we must decide is whether the agents' seizure of the van at the time of defendants' arrest and the warrantless dog search violated the Fourth Amendment rights of either Cook or Walter

Burnett. Both men had a privacy interest in the van entitling them to challenge the seizure and search; Cook was the lessee and, as such, had ultimate authority to decide who should have access to the vehicle, while Walter Burnett had actual possession of the van with Cook's written permission. Under these circumstances, both men could legitimately exclude others from using or searching the van, and they therefore have a Fourth Amendment privacy interest in it. Compare United States v. Smith and Cannon, No. 79-1293, slip op. at 2181 (2d Cir. Apr. 2, 1980) (driver of a car who is neither the owner nor lessee and who makes no showing that he is lawfully using the car has no Fourth Amendment rights in it).

Having decided that Cook and Walter Burnett have protectible Fourth Amendment rights in the van, we must go on to consider whether these rights were violated.

In Chambers v. Maroney, 399 U.S. 42 (1970), the

Supreme Court held admissible evidence seized from an automobile in which the defendants had been riding at the time of their valid arrest, where the search of the car did not occur until it had been driven to the police station. The Court appeared to rely on the exigent circumstances inherent in a vehicle's mobility to justify the later warrantless search, even though the car was securely in police custody and there was consequently little likelihood of it being driven away. 399 U.S. at 51.

Later Supreme Court cases make it clear, however, that the rationale for the "automobile exception" to the Fourth Amendment's warrant requirement is not only a vehicle's mobility, but also the reduced reasonable expectation of privacy one may have in a car in contrast to a private home. Arkansas v. Sanders, 442 U.S. 753 (1979); Rakas v. Illinois, supra; United States v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973). As noted by the Court in Cady v.

Dombrowski, supra, "warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." 413 U.S. at 441-442. Although evidence has been ruled inadmissible where seized without a warrant from a closed suitcase inside a car, Arkansas v. Sanders, supra, from a locked foot-locker placed in the open trunk of a car, United States v. Chadwick, supra, and from cartons sealed with tape inside a van, United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), the rationale for these cases is the increased reasonable expectation of privacy pertaining to sealed personal luggage.

None of these cases can affect the lawfulness of the dog search at issue here, however, since no luggage or other sealed containers were opened while Champion and his handler inspected the vehicle. See Dien, supra (opening sealed cartons in van at time of arrest violates the Fourth Amendment, but search

of the van itself at the scene of the arrest is constitutionally permissible).

Nor does it matter that the agents seized the van and drove it to the Customs post before conducting the search. The "probable-cause factor" to search the vehicle at the scene of the arrest "still obtained at the station house." Chambers v. Maroney, supra, 399 U.S. at 52. Moreover, the Supreme Court has upheld the seizure of a car upon the arrest of its occupants and a later search at the police station even where there was no indication that an immediate on-the-scene search of the car would have been impractical. Texas v. White, 423 U.S. 67 (1975).

The case law is thus clear that under these circumstances, the warrantless seizure and removal of the Dodge van, as well as the later dog search of its interior, did not violate any of defendants' Fourth Amendment rights. The dog's positive response to various parts of the van was therefore properly used in the government's affidavit to

obtain the search warrant which ultimately led to the discovery of the marijuana hidden in a trap under the stove. Movants' attempt to suppress the marijuana at trial must consequently fail.

Accordingly, we deny defendants' motion to suppress as to both the statements overheard by DEA agents in the motel rooms and the marijuana seized from defendants' van.

So ordered.

Dated: New York, N. Y.
July 9, 1980

/S/ LLOYD F. MacMAHON
LLOYD F. MacMAHON
U. S. D. J.

FOOTNOTES

1 Hermann Wallner, a co-defendant in this case, originally joined in the motion to suppress but was acquitted by the jury.

2 Cook and Walter Burnett lated pled guilty to one count of the indictment, but, with the government's consent, reserved the right to appeal the denial of their suppression motion. This practice has been approved by our Court of Appeals. United States v. Bronstein, 521 F.2d 459, 460 n.1 (2d Cir. 1975).

3 Rakas v. Illinois, 439 U.S. 128, 133-34 (1978).

4 United States v. Agapito, No. 79-1257, slip op. at 1681 (2d Cir. Mar. 12, 1980).

5 Agapito, supra, slip op. at 1691.

6 Agapito, supra, slip op. at 1694.